

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF
B. DAVID CREW,

Grievant,

v.

STATE OF DELAWARE, Department of
Health and Social Services,

Agency

DOCKET NO. 95-03-08

FINDING OF FACT

CONCLUSION OF LAW

OPINION AND ORDER

BEFORE Woo, Chairperson, Bowers, Fullman and Green, Members of the Merit Employee Relations Board, constituting a lawful quorum of the Board pursuant to 29 Del Code, Section 5908(a).

And now on this 18th day of April, 1996, the above-referenced matter being before the Board on May 25, 1995, the Board makes the following Finding of Fact and Conclusions of Law; to wit:

SUMMARY OF EVIDENCE

1. Loretta Brace was sworn and testified that she is a personnel officer with the Department of Health and Social Services (DHSS) in the New Castle regional office. Ms. Brace testified that she had known Mr. Crew since July, 1992.

Ms. Brace testified that in June, 1993, Mr. Crew came into her office to discuss his upcoming performance appraisal. Ms. Brace testified that he (Mr. Crew) stated that he was expecting an unsatisfactory appraisal and wanted to know what he could do. Ms. Brace testified that she told Mr. Crew about his right to rebut his appraisal. Ms. Brace testified that during this time, Mr. Crew was very upset; used a lot of profanity; and commented, "if I could get my hands around their throats, I would strangle them." Ms. Brace testified that she believed that Mr. Crew was referring to Dan Minnick and Dave Meara, as they were both involved in Mr. Crew's appraisal.

Ms. Brace testified that Mr. Crew was very angry and upset, and she suggested to him to take the afternoon off. Ms. Brace testified after Mr. Crew left her office, she informed her supervisor, Les Wright, of what occurred with Mr. Crew. Ms. Brace testified that she gave a statement to a police officer who came to her office.

2. On cross-examination, Ms. Brace testified that she could not recall exactly the profanity that Mr. Crew used, and described how Mr. Crew paced in her office.

3. On examination by the Board, Ms. Brace testified that there are 1350 employees in the Department and that an evaluation is performed when an individual has a change in supervision as well as every 12 months. Ms. Brace testified that Mr. Crew appeared comfortable in talking to her.

4. Ms. Brace testified on re-direct that any of the 1300 employees could have come to her if they were upset after an appraisal.

5. Ms. Brace testified on re-cross that after Mr. Crew left her office that she spoke to Les Crane about what had transpired and the advise that she had given to Mr. Crew. Ms. Brace testified that she never told Mr. Crew that he seemed to be threatening or scaring her.

6. Courtney Marshall was sworn and testified that in June, 1993 she was a quality control specialist for the department. Ms. Marshall testified that, as part of her job duties, Mr. Crew would come into her office for approximately 1/2 hour each day. Ms. Marshall testified that on June 16, 1993, Mr. Crew discussed his performance appraisal with her.

Ms. Marshall testified that Mr. Crew was upset and agitated as a result of the performance appraisal. Ms. Marshall testified that Mr. Crew used words such as "railroaded, unfair and hypocritical" towards Mr. Minnick and referred to his gun being loaded and the postal workers shooting in the midwest in a rhetorical way when he left the office. Ms. Marshall testified that she informed Tom McGuire, quality control supervisor, the next day about this incident. Ms. Marshall testified further that she felt for her personal safety when Mr. Crew was around, as he said he was searching for people who said something about this to administration.

7. On cross-examination, Ms. Marshall testified that she spoke to Tom McGuire the day after the incident and to Dave Meara approximately one week later, and she put it in writing at that time.

8. Olive Shepherd was sworn and testified that she is the training administrator for the Delaware Department of Health and Social Services. Ms. Shepherd testified that she established domestic violence and safety in the workplace training for the Department due to incidents of violence and death involving DHSS personnel in recent years.

Ms. Shepherd testified that Mr. Crew came to her office on June 25, 1993 to discuss a low performance evaluation he had received. Ms. Shepherd testified that Mr. Crew was very agitated in describing his feelings about getting low scores as he felt he was a hard worker and that his supervisor and branch chief were out to get him. Ms. Shepherd testified that she tried to reassure Mr. Crew about the evaluation, the application of the evaluation process and his right to grieve if he felt the process had not been done correctly.

Ms., Shepherd testified that Mr. Crew stated that he was so angry when he got his evaluation, he got up and left the room. Ms. Shepherd testified that Mr. Crew told her, "if I had a gun in my hand, I would have shot him," referring to his evaluator, Dan Minnick. Ms. Shepherd testified that Mr. Crew referred to Mr. Minnick as a "snot-nosed bastard" and to Dave Meara as a "stiff-necked s.o.b." Ms. Shepherd testified that Mr. Crew stated he was at war with his supervisor and was becoming agitated and angry. Ms. Shepherd testified further that she felt threatened by Mr. Crew's demeanor.

Ms. Shepherd testified that Mr. Crew left after reviewing the EPPA manual and appeared calm. Ms. Shepherd testified that she informed her supervisor and the deputy director. Ms. Shepherd testified further that about a week later, she met with her supervisor and Dave Meara, and related to them the entire incident.

9. On cross-examination, Ms. Shepherd testified that she did not recall meeting Mr. Crew prior to the date in question, but clearly recalled Mr. Crew's comments about Mr. Minnick and Mr. Meara. Ms. Shepherd testified she did not remember meeting Mr. Crew in the hallway looking for Martha Austin.

10. On examination by the Board, Ms. Shepherd testified that Dana Jefferson was the supervisor that she informed about the incident and that Ms. Jefferson had taken her to see Ms. Barnett. Ms. Shepherd testified that Ms. Barnett stated that he's (Mr. Crew) never threatened this before.

11. Daniel N. Minnick was sworn and testified that in June of 1993 he was a Management Analyst III for DHSS and had supervised Mr. Crew for approximately one year since the department had been reorganized. Mr. Minnick testified as to Mr. Crew's responsibilities and job duties, and that some of these duties had changed as part of the reorganization.

Mr. Minnick testified that in January 1993 he did an informal evaluation with a detailed performance plan for Mr. Crew so Mr. Crew could understand what was expected from him and how he would be evaluated from that point on, as he and Mr. Meara were dissatisfied with Mr. Crew's performance.

Mr. Minnick testified that various areas were identified to Mr. Crew for improvement, including his analytical skills. Mr. Minnick testified to a specific project that was given to Mr. Crew to perform with disappointing results.

Mr. Minnick testified that he prepared Mr. Crew's EPPA appraisal after consulting with Mr. Meara and the rating, which was a "below satisfactory" rating, was then given to Mr. Crew on June 16, 1993. Mr. Minnick testified that after the documents were exchanged, Mr. Crew stood up and stated that, "we could adjourn right now without any further comment." Mr. Minnick testified that he asked Mr. Crew his intent to which Mr. Crew replied that he was "going to war," and Mr. Crew left the room and slammed the door. Mr. Minnick testified that he returned to his office and wrote an E-Mail message to Mr. Meara about what had happened.

Mr. Minnick testified that Mr. Meara came into his office as he was completing the E-Mail and discussed the next steps after consulting the EPPA Manual. Mr. Minnick testified that Mr. Meara contacted Mr. Crew and a second meeting was set for June 22, 1993 where the rating was discussed by both Mr. Crew and himself. Mr. Minnick testified that Mr. Crew's concern was that he wouldn't get a pay raise on July 1, 1993 and Mr. Minnick assured him that he believed it would be above the satisfactory level.

Mr. Minnick testified further that he was informed on June 18, 1993 about Mr. Crew's comments to Ms. Shepherd by Linda Barnett, and that he was advised to stay away from Mr. Crew and to perform his work assignments at the Hospitality House building. Mr. Minnick

testified that he made a report to the State Police but no warrant was sworn out. Mr. Minnick testified that after formalizing Mr. Crew's EPPA he no longer supervised Mr. Crew and now works for the Division of Child Support Enforcement.

12. On cross-examination, Mr. Minnick testified that the first EPPA that was prepared in January, 1993 was not a formal EPPA as it did not have a performance agreement with it but was conducted to let Mr. Crew know how he stood at the time. Mr. Minnick testified that he did not feel threatened at the initial meeting when Mr. Crew walked out after stating "go to war", nor at the follow-up meeting held prior to finding out about the comments that had been made. Mr. Minnick testified that he filed the police report on June 30, 1993, and that Dr. McCena had contacted him to tell him that Mr. Crew was no direct threat to him.

13. On examination by the Board, Mr. Minnick testified that the first meeting with Mr. Crew was on June 16, 1993, the second meeting was on June 22, 1993 and the date of Mr. Crew's conversation with Olive Shepherd was June 25, 1993. Mr. Minnick testified that, at the time, he supervised one other person besides Mr. Crew.

14. On re-direct, Mr. Minnick testified that he had never given anyone an unsatisfactory job performance nor did he know until Ms. Barnett informed him on June 28, 1993 about Mr. Crew's comments.

15. On re-cross, Mr. Minnick testified that Mr. Meara did speak to him about Mr. Crew's behavior between June 16th and 28th.

16. B. David Crew was sworn and testified that he was a twelve year employee of the Department when his division was split up and he was assigned under Dan Minnick. Mr. Crew testified that his first evaluation was an official one, as it was rated. Mr. Crew testified that Mr. Minnick had mentioned to him a few things that were a real problem, but that Mr. Minnick never said that this is a very serious problem or that's a very serious problem.

Mr. Crew testified that prior to his reassignment, he had overheard Dave Meara state that "he (Mr. Meara) didn't want anybody from PR&E (the division where Mr. Crew was

working at the time.)” Mr. Crew testified that he didn’t anticipate the score he received on the second evaluation and that he did get upset.

Mr. Crew testified that he recalled speaking with Loretta Brace but he did not recall stating that he was going to strangle or put hands around the neck. Mr. Crew testified that Ms. Brace told him to calm down and relax, and she told him to look at the evaluation, the grievance process, and to write up some notes for his benefit and discuss it with his supervisor. Mr. Crew testified that Ms. Brace did not appear to be nervous nor did she tell him that she didn’t want him to leave her office while she went to get an EPPA manual, nor did he say any profane words about Mr. Minnick or Mr. Meara to her.

Mr. Crew testified that he spoke to Les Wright, Ms. Brace’s supervisor; and then to Dave Meara. Mr. Crew testified that he was upset when he talked to Courtney Marshall, but he did not say he had a loaded gun. Mr. Crew testified that he heard from a co-worker about postal employees shooting their supervisor and stated that to Mr. Marshall but that it never entered into his mind to do something like that.

Mr. Crew testified that he was going to see Martha Austin when he encountered Ms. Shepherd, who proceeded to invite him into her office. Mr. Crew testified that he told her what had happened and told her how he had felt a few weeks ago; but never said the words “bastard” or “snot-nosed” or “son of a bitch.” Mr. Crew testified that he may have said “hard-nosed, but not the profanity that was testified.

Mr. Crew testified further that he thought his conversation with Ms. Edwards was confidential, but that he now realizes this is not so. Mr. Crew testified that he had a meeting with the director and Tony Iani of the Department of Personnel office about the incident as well.

Mr. Crew testified further that he did not feel that there was a fair assessment performed, and that the time delay after the alleged incident to the start of the investigation caused some people not to remember the events clearly. Mr. Crew testified that he did not say anything about a loaded gun, and never said he was out to do harm. Mr. Crew testified that the evaluation was unfair, and that there was nothing positive about evaluation.

17. Upon examination by the Board, Mr. Crew testified that he did express himself by stating that he “was at war with my supervisor” and that he did know that he could have availed himself of the grievance procedure regarding evaluations. Mr. Crew testified it was a

coincidence that he brought up the post office incidents, and that he had no intention of threatening anyone's life.

18. David Meara was sworn and testified that on June 28, 1993 he was informed by Linda Barnett and Olive Shepherd about Mr. Crew being a threat to Mr. Minnick. Mr. Meara testified that he did not recall stating to Mr. Crew that "we didn't see you as being a threat" at a meeting in July, 1993. Mr. Meara testified that Tom McGuire came to him with concerns from the Hospitality House staff regarding Mr. Crew's actions, and that occurred on June 28, 1993.

19. On examination by the Board, Mr. Meara testified that he didn't believe that Mr. Crew was a threat to him personally, but felt that Mr. Crew did engage in conduct which included making threats against supervisors and making threatening comments to co-workers at the department. Mr. Meara testified that Mr. Crew met with Mr. Minnick on June 16, 1993, and Mr. Crew stormed out of the meeting, stating "I'm not going to take this. This is war." Mr. Meara testified that three separate incidents within a ten-day period then occurred; first with Loretta Brace, second with Courtney Marshall and the third incident with Olive Shepherd.

20. Mr. Crew was recalled and testified that he had been going to therapy, was not a troublemaker, and that any language that was used, was used in a metaphoric way.

THE LAW

29 Del. C. § 5931. Grievances.

"The rules shall provide for the establishment of a plan for resolving employee grievances and complaints. The final two (2) steps of any such plan shall provide for hearings before the Director or the Director's designee and before the Board, respectively, unless a particular grievance is specifically excluded or limited by the Merit Rules. The director and the Board, at their respective steps in the grievance procedure, shall have the authority to grant back pay, restore any position, benefits or rights denied, place employees in a position they were wrongfully denied, or otherwise make employees whole, under a misapplication of any provision of this chapter or the Merit Rules. The rules shall require that the Board take final action on a grievance within ninety (90) calendar days of submission to the Board. Upon approval of all parties, the ninety (90) days may be extended an additional thirty (30) calendar days. (29 Del. C. 1953, § 5931; 55 Del Laws, c. 443, §6, 69 Del. Laws, c. 436, §7.)" Effect of amendments -- 69 Del. Laws, c. 436, effective July 14, 1994, rewrote this section.

Merit Rule No. 15.0120 Suspension Without Pay

An employee may be suspended without pay by the appointing authority for reasons of misconduct, negligence, inefficiency, insubordination, unauthorized absence or any other reason in 15.0200 when other action is not appropriate.

Suspension without pay shall not exceed thirty (30) calendar days unless court action has been filed and is pending in a matter that led to the suspension. In no case shall suspension with pay be utilized, but retroactive pay may be granted should the suspension prove unfounded. Prior to a suspension without pay, a conference between the employee and his/her supervisor should be scheduled to afford the employee an opportunity to offer a defense and reasons why the suspension should not be given. If the supervisor remains convinced that suspension is warranted, this disciplinary measure may then be imposed. Only in circumstances affecting health, safety or security of the State or its employees, clients, patients, inmates and students, may suspension without pay be imposed before this conference is held.

The notice requirements of Rule 14.0610 apply to suspensions as well. The documentation shall be placed in the employee's personnel file. Suspension documentation shall be removed from the employee's personnel file two years after the last occurrence of any subsequent similar offenses.

Merit Rule No. 15.0201

Failure to meet reasonable standards of conduct. This offense would include, but is not limited to fighting, threatening physical harm to another, indecent or immoral conduct on duty, and false, malicious, unfounded or highly irresponsible statements against the State, other employees, supervisors, subordinates or other officials, with the intent to damage such person's reputation or authority. An employee may be dismissed for committing any of these offenses.

Merit Rule No. 15.0214

Profane, obscene, insulting words toward the public or any State employee. Abusive or offensive language, severe rudeness or boisterousness that adversely affects discipline, production or morale, would warrant termination. (See progressive penalties for similar offenses under 15.0220.)

Merit Rule No. 15.0220

Threatening, intimidating, harassing, or interfering with employees or supervisors at any time. Abusive or offensive language toward a subordinate; baiting or otherwise inciting a subordinate to violate rules or regulations; coercion in deprivation of an employee's rights; or reprisal for use of grievance procedures could require a 5-day suspension for a first offense and a 30-day suspension for a second offense. If the act was malicious and deliberate, the appointing authority would be justified in suspending the employee 30-days for a first offense and dismissing the employee for a second offense.

FINDINGS OF FACT

1. B. David Crew engaged in threatening and intimidating conduct when he received his evaluation from his supervisor, Daniel Minnick, on June 16, 1993.
2. B. David Crew made threatening comments about Daniel Minnick to Loretta Brace, Courtney Marshall and Olive Shepherd in June, 1993 after Mr. Crew received his performance evaluation which were directly related to the performance evaluation.
3. B. David Crew's testimony that he meant no harm does not match his body language which indicated to his supervisor and co-workers that he was very serious and agitated and was capable of doing harm to Mr. Minnick.
4. B. David Crew's conduct did threaten the health and safety of Daniel Minnick to the point that discipline was appropriate by the appointing agency.


CONCLUSION OF LAW

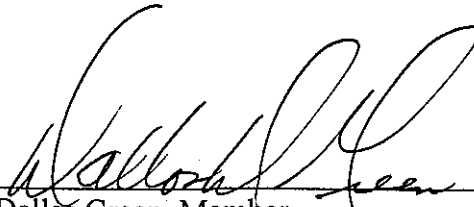
The conduct of Mr. Crew towards his supervisor, Mr. Daniel Minnick, in June, 1993, and the comments made to Ms. Brace, Ms. Marshall and Ms. Shepherd were a sufficient basis to suspend the grievant for five days pursuant to Merit Rules 15.0120 and 15.0200. State employees have a right to a safe workplace, free from intimidating conduct from other employees, and Mr. Crew had appeal rights under the Merit Rules to pursue a grievance about his performance evaluation.

ORDER

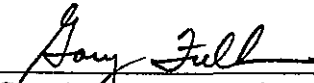
The grievance is denied. The employer, the State of Delaware Department of Health and Social Services had a sufficient, factual and legal basis for issuing a three-day suspension to the grievant, B. David Crew.

IT IS SO ORDERED


Katy K. Woo, Chairperson


Dallas Green, Member


Walter Bowers, Member


Gary Fullman, Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

Mailing Date: April 18, 1996

JFB:jlt

Distribution:

Original: File

Copies: Grievant

Grievant's Representative

Agency

Agency's Representative

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